Lewis George and Ann Thomas, a Co-Partnership d/b/a Nicholas George Theatres and Woods Theatre, Westborn Theatre, Hampton Theatre, Commerce Drive In Theatre and Holiday Drive In Theatre *and* Detroit-Pontiac Motion Picture Projectionist Union, Local 199, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO. Case 7-CA-19486

March 22, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 31, 1982, Administrative Law Judge William A. Gershuny issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in response to the exceptions of counsel for the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] Contrary to the contention of counsel for the General Counsel that the Administrative Law Judge, in making his findings of fact, failed to consider the testimony of Union Business Representative William Gagnon, we are satisfied, on the basis of a review of the entire record and the Administrative Law Judge's Decision, that the Administrative Law Judge based his findings on all of the record evidence, including Gagnon's testimony.

We disavow the Administrative Law Judge's characterization of an affidavit taken of Respondent General Manager Richard Kline as "concededly taken by a Board agent in violation of Board procedures requiring that managerial employees be advised that they need not give an affidavit and that they have a right to be represented by counsel." We find no support in the record for concluding that any such concession was made at the hearing by counsel for the General Counsel, nor do we find that the affidavit was improperly taken.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge: A hearing was conducted in Detroit, Michigan, on July 14-15, 1982, on complaint issued August 14, 1981, alleging a violation of Section 8(a)(1) and (3) based on Respondent's refusal to hire Daniel Bzovi and Paul Flowers on June 16, 1981, because they were union members.

The single issue is whether the two individuals were refused employment because of their union membership.

It also is important to restate what is not at issue. Counsel for the General Counsel expressly acknowledged, at the pretrial conference and again at the hearing, that he was *not* proceeding on a theory which might impose an obligation to hire based on Respondent's acquisition of the theater at which both were working, or on any other theory which might give rise to an obligation to afford employment to the predecessor's employees. Moreover, there is no allegation or contention that Respondents refused to employ the individuals to avoid an obligation to recognize the Union or bargain with it. And, finally, there is no allegation or contention that Respondents unlawfully refused to bargain in good faith with the Union. Originally charged by the Union, that allegation was dropped from its amended charge and was not included in the General Counsel's complaint.

Based on the record evidence, my observation of witness demeanor, and the post-trial briefs, I conclude that the allegations are wholly unsupported and that the complaint must be dismissed.[1]

I. JURISDICTION

The complaint alleges, the answer as amended does not contest and thus admits, and I find that Respondents, engaged in the operation of a theater with annual interstate purchases in excess of $50,000, are employers within the meaning of the Act.

[1] After all parties had rested, counsel for the General Counsel moved to amend the complaint by alleging an additional violation as to one of the two individuals: that Respondents unlawfully refused to hire Bzovi also on or about August 13, 1982. The basis of the motion was an exchange of correspondence in August 1981 between Respondents' General Manager, Kline, and Daniel Bzvoi. This correspondence was in the possession of the Charging Party since August 1981. No such allegation was included in any charge filed by the Union and no attempt was made to amend the complaint until all parties rested their case. The motion to amend was denied as untimely. In addition, Respondent had no notice of the issue and the issue, accordingly, was not litigated. Bzovi already had testified without referring to the correspondence and left the Federal Building; Kline had also testified, but the questioning as to the correspondence had been superficial in view of the fact that the only allegation as to an unlawful refusal to hire Bzovi involves events 2 months earlier, in June 1981. It would be unconscionable, in my opinion, to interpose additional, unwarranted delays and expenses in a case already 1 year old, solely by reason of negligence on the part of the Charging Party and/or the General Counsel in the preparation of the case. In any event, the correspondence would hardly support the allegation. In response to Respondents' invitation of August 5, 1981, to arrange for an employment interview, Bzovi replied on August 13, 1981, that any negotiations concerning his employment must involve Local 199, with whom Respondents had no contract at the theater and with whom even Respondents' predecessor had no contract for 6 months prior to the sale of the theater. Since he knew that Respondents were under no legal obligation to treat with the Union, the sole permissible interpretation of Bzovi's letter is that he declined to apply for employment.

II. LABOR ORGANIZATION

The complaint alleges, the answer (by not denying) admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

The Holiday Drive In Threatre, prior to June 16, 1981, was a corporation owned by Daniel Bzovi and two family members. Until January 1981, there was in effect at the theater a labor agreement with Local 199 covering projectionists only. The contract provided that all projectionists would be referred by the Union to the threater owner for employment, that owners could reject referrals for cause, and that disputes as to referrals would be resolved through a grievance procedure. In January 1981, the contract expired and, according to Bzovi, no contract was in effect from that time until June 16, 1981, when the theater was sold to Respondents. Bzovi not only was one of the owners of the theater, he also was the manager and the full-time projectionist. He admittedly hired, fired, and supervised all theater employees and received a salary rather than the contract hourly rate. In these capacities, he clearly was not a member of the bargaining unit covered by the labor agreement, even though he maintained his union membership. In addition to Bzovi, Paul Flowers was employed at the theater as a part-time "swing shift" projectionist (2 days a week) and a number of others were employed as cashiers, concession stand clerks, and ushers. Flowers was a member of Local 199 and a member of the bargaining unit; the other theater employees were not covered under any labor agreement.

In May 1981, Respondents agreed to purchase the theater and the acquisition was concluded at a closing held on June 16, 1981. None of the purchase agreements dealt with the employment by Respondents of the current work force and, admittedly, nothing was said or discussed as to employment at any time prior to the transfer of ownership on June 16, 1981. During the closing, Bzovi advised Respondent George that he had received a proposed labor contract from Local 199 and the latter responded that he would take care of the union matters.

According to Bzovi, the only reference to his continued employment with the new owners occurred at the conclusion of the late afternoon closing, with George telling Bzovi to "show up" and to "go in to work" that evening. Remarkably, Bzovi did not testify that he asked George whether he was being employed as manager, manager-projectionist, or projectionist, or what his hours, salary, or other rate of pay would be. This is significant, for the reason that there was no existing contract covering projectionists at the theater and, of course, other classifications were not covered under any labor contract. Nevertheless, he testified he reported to the theater at 6:30 p.m., just a couple of hours following the closing, to find General Manager Kline and an entire crew who, Kline told him, would run the theater. All employees of the former owner (none of whom were union members) had already been sent home; Bzovi was asked only to show the new projectionist where the power switches were located. Bzovi did so and left. There is no evidence in this record as to whether the new projectionist already was an employee of Respondents at another of its 13 theaters (and therefore already a union member under a contract with Local 199) or was a newly hired nonunion member. Similarly, there is no evidence as to whether the remainder of the "new" crew were really new or simply transferred from other of Respondents' theaters.

Incredibly, on cross-examination, Bzovi admitted without qualification or hesitation that he told the new owners that he did not want to work at the Holiday Drive In Theatre; that he did not ask for a job; that he was not refused employment; and that paragraph 12 of the complaint, which alleges an unlawful refusal to hire him, was incorrect.

Bzovi also testified that Kline, on the evening of June 16, told him "We would run as a non-union house," "We would try to run as a non-union house," and "We would try to make the theater a non-union house." How that subject arose was not explained by Bzovi.

I am unable to credit his testimony in this regard and, also, as to George's instruction to him to "go in to work." As to the former, it flies into the face of other uncontroverted facts: that Respondents' other 13 theaters with 33 screens are all operating under union contracts; that there was no existing contract at the theater on June 16; that, in other instances where Respondents acquired a theater not covered by contract, Respondents began negotiating with the Union soon after settling into the new business; and that this is precisely what Respondents did as to Holiday Drive In Theatre. The only reason why there is no contract is that the parties are currently negotiating as to which particular theater category is applicable. As to George's alleged statement to "go in to work," again the uncontroverted facts tell an entirely different story: that, within a matter of 2–3 hours, Respondents had assembled at the new theater an entirely new crew; and that, according to his own admission, Bzovi did not want to work there and had never asked for employment.

I find that Kline did not say Respondents would operate or try to operate nonunion and that Bzovi was not told to report to work, but rather was asked only to go the theater to orient the new projectionist.

Flowers' testimony was equally remarkable. He, like Bzovi, admitted that he never asked Respondent to hire him, and that they did not refuse to hire him. He testified only that he showed up at the theater on June 18, 2 days after the sale, and was told that he was not working, but someone else was. Apparently, neither Flowers nor the other former employees had been told by Bzovi that the theater had been sold.

Flowers had been the Holiday Drive In swing-shift projectionist for 2 months under Bzovi's ownership. For several years prior to that, he had worked at a number of other theaters owned by Respondents. His work history was a troubled one, at best according to Flowers: at Respondents' Southgate in-door theaters, he was disciplined with union acquiescence when he had "problems" with the equipment and it was "decided" it would be best if he left the job; again at Southgate, he was "sus-

pended" for 30 days with union acquiescence; again at Southgate, he had a problem with film "all over the booth" causing the theater to be closed down for the night and he again resigned; at the Jolly Roger Theater, he resigned when he had a problem as projectionist and was accused of accosting a female concession clerk. He admitted that he has not since been referred for work to any of Respondents' 14 theaters, although, he testified, he has worked for other theaters including Holiday Drive In when it was owned by Bzovi.

General Manager Kline relates a clearer, more credible version of Flowers' work history in 1979–80, based on Kline's review of company records which he brought with him to the hearing: that Flowers was alleged by a female employee to have urinated on the floor in the concession area; that, at Respondents' Camelot Theater, he had problems in handling the equipment and was chastised by the Union's Booth Committee; that at Southgate he had a number of problems resulting in lost shows, his replacement by the Union on an emergency basis one evening, his being placed, at the Union's request, in a training status with no pay for 30 days, and his being replaced again by the Union on an emergency basis within 1 hour when he had film all over the floor; that, later at Jolly Roger Theater on March 15, 1981, when he was accused of urinating on the floor, he again was replaced by the Union first temporarily and then permanently; and that thereafter, the Union never referred Flowers to any of Respondents' 14 theaters.

I find that Flowers, during the period from 1979 through the time of Respondents' acquisition of the Holiday Drive In Theatre was not a competent or qualified projectionist and that there existed a tacit understanding between the Union and Respondents that, after March 1981, Flowers would not be refered to work at any of Respondents theaters because of his prior unsatisfactory work history.

Counsel for the General counsel makes much of a supposed "admission" (selectively extracted from an affidavit concededly taken by a Board agent in violation of Board procedures requiring that managerial employees be advised that they need not give an affidavit and that they have a right to be represented by counsel), when read in conjunction with other introductory statements, is in fact not an admission at all: Flowers' work history was not a factor because Respondents never attempted to hire him. Respondents already has a work force at the time of purchase and immediately began operations with those employees. And, as noted above, Flowers admittedly never asked for employment and never was refused employment by Respondents.

I find and conclude, based on the foregoing, that the fact of union membership played no role whatsoever in Respondents' decision not to hire or offer employment to Bzovi and Flowers and that Respondents would have declined to hire or offer employment to them despite that fact.

ORDER[2]

It is ordered and directed that the complaint herein be, and the same hereby is, dismissed.

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[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of said Rules, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.